Nos. 81-91, 80-1808, & [illegible]1798

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

SUPREME COURT, U.S.
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ALEXANDER L. STEVAS,

No. 81-91

OREGON-COLUMBIA CHAPTER, THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 80-1808

PACIFIC NORTHWEST CHAPTER OF THE ASSOCIATED BUILDERS AND CONTRACTORS, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 80-1798

WOELKE & ROMERO FRAMING, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

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BRIEF *AMICUS CURIAE* ON BEHALF OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, URGING REVERSAL

This brief *Amicus Curiae* in support of the position of the petitioners, and in support of the legal right

of all of the individual employees in the United States, is filed by the National Right to Work Legal Defense Foundation pursuant to Rule 36 of the Rules of this Court.

INTEREST OF THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION

The National Right to Work Legal Defense Foundation is an organization formed to protect the Right to Work, freedom of association, freedom of speech and other fundamental liberties of ordinary working men and women where these basic rights are infringed by unconstitutional or other illegal practices in connection with compulsory union membership.

The National Right to Work Legal Defense Foundation's primary interest is in aiding any employee, or potential employee, whose human and civil rights have been infringed or are threatened because of injustices arising out of compulsory unionism arrangements.

If affirmed, the Ninth Circuit's interpretation of § 8(e) of the National Labor Relations Act will:

(1) provide for unlimited "top down" organizing in the construction industry,

(2) destroy the delicate balance between the federal labor and anti-trust laws, and

(3) most importantly, deny individual employees in the construction industry their associational rights guaranteed by § 7 of the Act.

The Foundation does not doubt that the petitioner-employers will fully argue their interests. However,

because their interests will naturally focus on their ability to conduct business unrestrained by union activity, the Foundation submits that it can and will properly and completely argue the position of the employees affected by this decision. The Foundation is thus in a position, as advocate of all employees who wish the opportunity to exercise the freedom of choice regarding representation by a labor organization, to contribute its assistance to the Court to properly set forth the issues involved and the broad ramifications that any decision of this Court might have on all construction employees.

SUMMARY OF ARGUMENT

The National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. §§ 151-169, and as interpreted by this Court since 1935 represents a continuing legislative and judicial effort to delicately balance numerous policies of major national importance. These policies, as they relate to this case, are: first, the guiding principle and goal that employees shall have the right to participate in self-organization, collective bargaining, and concerted activities or to refrain from these activities subject only to the limitation imposed by § 8(a)(3) and § 9 of the NLRA; second, the prohibition against "hot cargo" and secondary boycott agreements in furtherance of a policy of unfettered and unrestricted commerce between the states; and third, a need to eliminate, to the extent possible, the crippling effects of strikes and picketing brought about by labor unrest said to be caused by permitting union and nonunion workers to work at the same construction-site.

These competing policies are part of the overall national policy to develop laws that will permit busi-

ness to thrive in a free enterprise society with minimal interference with the rights of employees, labor organizations, and employers.

The decision of the Ninth Circuit has focused narrowly on the policy to secure labor peace at the construction site and has thereby effectively eliminated the freedom of association of the employee and destroyed the freedom of the employer-contractor to choose with which firms he will do business.

The Ninth Circuit opinion torturously explains how the principles set forth by this Court in *Connell Construction Co., Inc.* v. *Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616 (1975) do not apply. The *en banc* majority of the court relied upon the bargaining relationship existing between the unions and employees in these cases to distinguish *Connell.* And, in this distinction, the court found a basis to ignore the policy to prevent unfettered top-down organizing, as expressed by Congress through the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), 73 Stat. 519 (1959) and as discussed in *Connell,* in favor of a perceived need to secure peace at the workplace at all costs.

This Foundation is of the view that the construction industry proviso of § 8(e) is an integral part of the delicate balance of the policies discussed above, and that the proviso must be interpreted with a view to preserving the balance thus far achieved by Congress and the courts. The Ninth Circuit's emphasis on labor peace at the work site destroys this balance. Competition, as well as labor strife, will be driven from the construction workplace. And the freedom of choice, as it pertains to the decision of the individual

worker, will no longer be a recognizable right. The unions will effectively control the workers, the choice of contractor, the costs of the project, and for all purposes the quality of the work performed. Such an overwhelming imbalance has never been the policy of the Congress, and it must not be permitted to flourish through judicial fiat in the absence of congressional intent.

ARGUMENT

Central to the resolution of these cases is the determination of the scope of the construction industry proviso of § 8(e) of the NLRA. 29 U.S.C. § 158(e). More specifically, whether the proviso permits a union to negotiate an agreement that prohibits the employer-contractor from subcontracting construction site work to any firm or person that does not have a current effective negotiated agreement with that union.

The Ninth Circuit considered the validity of such clauses in the context of two factual settings that are remarkably similar to the facts in *Connell*. First, the agreement with the Associated General Contractors (AGC) was a master labor agreement that had been negotiated between AGC and Local 701 of the International Union of Operating Engineers (Engineers). The agreement covered approximately 200 contractors doing business in Oregon and parts of Washington, and ostensibly covered all work within the jurisdiction of Local 701 throughout that geographical area for a period of five years. The agreement not only covers work ongoing at the inception of the agreement, it covers work yet to begin and yet to be conceived. This multi-employer contract is for all purposes identical to the agreement between the

Local 100 and the Mechanical Contractors Association of Dallas that existed in *Connell.*

Second, the Ninth Circuit considered the same "specific union only" subcontracting clause that was the point of contention between Woelke and Romero Framing, Inc. and Locals 235 and 944 of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Carpenters). This latter relationship is similar to the agreement between the Connell Construction Company and Local 100 that fostered this Court's opinion in *Connell.* However, neither the AGC or the Woelke-Romero contract contains a "most favored nation clause" as found in the Mechanical Contractors Association agreement in *Connell.*

The significant factual distinction between *Connell* and the instant cases is that in *Connell* there was no ongoing collective bargaining relationship. In these cases a collective bargaining relationship has been stipulated.

The Ninth Circuit reviewed the "specific union only" subcontracting clauses in the instant cases in light of the legislative history of the Labor Management Reporting and Disclosure Act of 1959 and the decision of this Court in *Connell,* but decided to disregard this Court's concerns for the "stranger - contractor", "job-site work", and "top-down organizing" issues because of the existence of a collective bargaining relationship in these cases. Yet, almost as an apology, the Ninth Circuit conceded that "the language of the *Connell* opinion dealing with congressional antagonism toward 'top down organizing' may well lean in a direction contrary to our views." 654 F.2d 1301, 1320 (9th Cir. 1981).

The Ninth Circuit, by focusing on the narrow factual distinction in *Connell* regarding the lack of a collective bargaining relationship, failed to take this Court's advice regarding the need to balance the nation's anti-trust and labor policies. Thus, the Ninth Circuit avoided the considerable anti-trust issues and the attendant critical Section 7 considerations that must be resolved in order to preserve the delicate balance of the competing significant public interests represented by these cases.

I. THE EFFECT OF THE NINTH CIRCUIT DECISION

The primary effect of the Ninth Circuit decision is to permit the enforcement of "specific union only" subcontracting clauses in large regional master labor agreements between very large employer-contractor groups and specific unions within the construction industry. Distilled to its basic ingredients, this holding means that none of the 200 contractors who are signatories to the master labor agreement with the Operating Engineers in the Oregon-Washington area can subcontract any of the work, either general or detailed, to be done on any construction project during the life of the contract, unless the firm to be employed has an existing negotiated agreement with the Engineers.

Viewed from another perspective, the ruling means that no prospective sub-contractor can hope to be a successful bidder for any work on any projects controlled by any of the 200 contractors throughout the Washington-Oregon area for a period of five years unless the firm has an existing agreement with the Engineers. This is true, not only in the case where

the prospective subcontractor is not a party to a collective bargaining agreement, but even where there is an existing negotiated agreement—and therefore an exclusive bargaining representative—if that agreement happens to be with a competing union.

Viewed then from the level of the subcontractor's employee, not only is he required to be a member of the union or to pay an agency fee to safeguard his employment, he must also have correctly elected to be organized by the proper union, in this case the Engineers. For if he should have exercised his § 7 franchise to elect a competing union, or no union, he shall be precluded from work in a significant portion of the construction industry in Oregon and Washington for a long time. In fact, to the extent that Local 701 [1] is successful in achieving "specific union only" clauses with additional contractors throughout the region, employees who are members of other unions or in unorganized firms will be precluded from any work at all.

Furthermore, in cases where any union is successful in securing "specific union only" clauses throughout a substantial portion of the construction industry in a particular region, it will have achieved the monopolistic power to destroy any competing union, or any firm unfortunate enough to have a competing union as its exclusive bargaining representative, or any firm that is unorganized. The protected union can then manipulate competition throughout the industry by

[1] The "specific union only" clauses contained in the Engineers and Carpenters agreements are identical for the purpose of this argument. All references to the Local 701 agreement are meant to apply equally to the Carpenters agreements in the *Woelke & Romero* case.

selectively limiting the firms with which it will sign agreements. By refusing to enter agreements with other firms, the union can effectively drive them out of business. The ability of a particular union to decide which firms will be eligible to bid on construction projects gives the union a strangle-hold over all subcontractors, all general contractors and all employees throughout the industry. Essentially, it is equivalent to absolute control of the industry, licensed by federal labor statutes.

In such a climate, the Section 7 rights of the employee to refrain from organizational activities, or even to select a representative of his own choice, will be effectively and deliberately destroyed.

II. THE LEGISLATIVE HISTORY OF § 8(e)

Recent history has produced a broad range of opinions regarding congressional intent leading to the enactment of the LMRDA, especially as to the scope of the § 8(e) construction industry proviso. Yet, there is at least some agreement that the basic purposes of the § 8(e) proviso were to accommodate the union's difficult organizing problems in the construction industry and to eliminate the work-site friction said to be caused by union and non-union workers working side by side on construction projects. Unfortunately, the legislative history fails to disclose whether there was any intent to limit the form of subcontracting clauses under the 8(e) proviso. At best there seems to be agreement that the proviso permits unions and prime contractors in the construction industry to enter into agreements in which the contractor refuses to subcontract to nonunion operators. *See* 2 Legislative History of the LMRDA pp. 1818, 1821, 1858.

Because of the facts of this case, it is important to distinguish between the types of firms with which general contractors can subcontract. Specifically, they will be either firms with agreements entered into pursuant to either §§ 8(f) or 9(a) with the same union, or firms with agreements or recognitional obligations with unions other than the union with which the contractor has an agreement, or unorganized, i.e., nonunion firms.

Throughout the legislative history, the comments relative to § 8(e) proviso subcontracting refer only to the authority to limit subcontracting to "union" subcontractors. There is no grant of affirmative authority which would permit a union to limit subcontracting to agreements only with a specific union. To this extent, a distinction must be recognized between the purposes to be effected by "union only" clauses which would insure that none of the workers on the job site were nonunion, and "specific union only" clauses which would insure that all of the workers within any work jurisdiction on any job site would be members of the *same* union.

Although it is perhaps arguable that one of the purposes of the Landrum-Griffith Amendments was to eliminate job-site friction by permitting agreements that insure all on-site workers to be union members, it has never been argued that one of the purposes of the Amendments was to provide for the security of one union over a competing union. And, although it may be a legitimate goal for any union to attempt to exclude other competing unions through the process of negotiation with the various employers, a review of the history of the Amendments does not permit a conclusion that Congress intended to vest

unassailable organizational preferences in a single union simply because it was able to effect a prehire agreement with a group of major contractors.

Another aspect of the subcontracting clause that is not discussed with clarity within the legislative history is the type and extent of subcontracting problem that precipitated enactment of the proviso. It is one thing to examine a single construction project and conclude that it is within the scope of federal labor policy to permit a general contractor to enter into an agreement, for the sake of job-site peace, that would limit his subcontracting rights to firms with union affiliation. It is an entirely different matter to extend the benefits of that rationale to permit a specific union to contractually require hundreds of contractors in a multi-state region to refrain from entering into any subcontracts with firms who are either unorganized or who are signatories to agreements with unions other than the general contractor's union, and to extend these agreements not only to projects underway but to any projects the contractor might contemplate in the future. While it is conceivable that the evil to be controlled by the limited form of top-down organizing in the first instance might be of legitimate concern to the formulators of national labor policy, it is inconceivable that in its effort to eliminate the work-site labor strife Congress intended to vest such enormous power in the hands of so few. Indeed, it is difficult to believe that Congress even imagined, in 1959, the type of vast multi-employer single union contracts that are the subject of this litigation. Surely, had Congress intended to create such unlimited top-down organizing power it would have attempted to reconcile the affected broad national policies. There is no evi-

dence of such an attempt at any point within the legislative history. In fact, the opposite seems to be the case. It is uncontroverted that the basic thrust of § 8(e) is to prevent the problems created by secondary boycotts and broad top-down organizing. And, although the construction industry proviso carves out an exception for that industry, it should not be interpreted to extend beyond the need for which it was created; that is, the need to eliminate the crippling effects of labor strife at the construction work site. The interpretation accorded the proviso by the Ninth Circuit goes far beyond the need to eliminate job site strife. It creates within the union the power not only to eliminate strife, but also to eliminate competition between the unions and, to the extent that the protected union can dictate which subcontractors will be blessed with agreements, to eliminate competition between employers and the firms with which they deal. Most importantly, the freedom of choice for employees, the cornerstone of national labor policy, is destroyed.

The net effect of such a broad grant of power to unions is to unbalance the competing federal policies to preserve the right of self-determination of employees, to eliminate combinations in restraint of trade, and to minimize work-site labor strife in the construction industry. It subverts the rights of workers and the federal anti-trust policies in favor of unlimited organizing power in the hands of union executives. Whatever the intent of the ambiguous legislative history of the LMRDA, it most assuredly was not to give unions more unfettered power. At a minimum the LMRDA was intended to protect employees' rights to organize, choose their own representatives and to

protect the free flow of commerce of the nation. Section 2, LMRDA. It was enacted, in part as a result of the demonstration of union abuses illuminated by the McClellan Hearings. Certainly, it could not have been Congress' intent to eliminate these abuses by granting unlimited organizing power to the few most powerful unions. Such a result must be universally recognized to be contrary to the purposes of the LMRDA when it is examined as a unified legislative effort.

III. THE APPLICABILITY OF THE CONNELL DECISION

The *Connell* case reached this Court on a complaint by the employer Connell, that the "specific union only" subcontracting clause in the master labor agreement with the union violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2. Connell sought a declaration that this provision was invalid and an injunction against any further efforts to force it to sign an agreement. 421 U.S. at 621. Unlike *Connell* these cases arrive at this Court through the processes of the NLRA. The cases involving Local 701 were brought on complaint of the Associated Builders and Contractors that the "specific union only" clause violated § 8(e). The case involving the Carpenter's Locals 235 and 944 was brought on complaints of the Woelke and Romero Framing Company that the Locals violated § 8(b)(4)(i) and (ii)(A) by picketing to require the employer to enter into an agreement which is prohibited by § 8(e). Thus, in the instant cases the primary issue was a determination of the scope of subcontracting clauses as they are permitted by the construction industry proviso of § 8(e).

In *Connell,* this Court approached the § 8(e) issue by first determining whether or not the conduct was

violative of federal anti-trust laws or whether because it involved organizing efforts of a labor organization it was immune from federal anti-trust policy. The *Connell* Court concluded that despite a strong labor policy favoring the association of employees to eliminate competition over wages and working conditions, that policy clearly does not require that a union have freedom to impose direct restraints on competition among those who employ its members. 421 U.S. at 622. The Court went on to explain that "the most favored nation" clause of the multi-employer agreement, in combination with the "specific union only" subcontracting clause, had the effect of giving Local 100 the power to control access to the market for mechanical subcontracting work. Importantly, the Court distinguished that:

> [t]he agreement with general contractors did not simply prohibit subcontracting to any non-union firm; they prohibited subcontracting to any firm that did not have a contract with Local 100.

421 U.S. 624. Thus, this Court has early recognized that there is a major distinction between a prohibition against contracting with non-union firms and a requirement to contract only with "specific union only" firms. This aspect of *Connell* is central to the primary issue in these cases.

Further, the Court recognized that this type of control could have significant adverse effects on the market and on consumers—"effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions." *Id.* In sum, the Court concluded that although the union's goal of complete organization would be legal, the "methods

the union chose are not immune from anti-trust sanctions simply because the goal is legal." 421 U.S. at 625. The Court further held that such subcontracting clauses were a direct restraint on the business market and had substantial anti-competitive effects, both actual and potential, and thus contravened the "anti-trust policy to a degree not justified by congressional labor policies, and therefore cannot claim a statutory exemption from the anti-trust law." *Id.*

The Court then concluded that because the subcontracting agreement was not reached within the context of a collective bargaining relationship, the anti-trust aspects of the agreement could not be sheltered by the federal policy favoring collective bargaining. 421 U.S. at 628. The Court remanded the case for a factual determination regarding whether the agreement actually restrained trade within the meaning of the Sherman Act. 421 U.S. at 637. Significantly, the Court avoided determining whether the type of direct restraint created by the agreement actually violated the Sherman Act or might be entitled to an anti-trust exemption "if it were included in a lawful collective bargaining agreement." 421 U.S. at 628.

It would seem then that the *Connell* case was significant because it recognized that "specific union only" clauses *could* be violative of federal anti-trust policy. The decision implies, by the use of the language

> [t]here can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an anti-trust exemption if it were included in a lawful collective-bargaining agreement.

421 U.S. at 625, that even in cases arising in the context of a collective bargaining relationship such clauses might not be entitled to immunity from anti-trust policy. And finally, it is significant that the Court recognized the need for a factual determination of the anti-trust issues as evidenced by its remand.

The Ninth Circuit, perhaps taking its lead from the decisions of the National Labor Relations Board, focused on the phrase in *Connell,* providing that

> [a]bsent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on 'top-down' organizing, we are unwilling to read the construction-industry proviso as broadly as Local 100 suggests. Instead, we think its authorization extends only to agreements in the context of collective-bargaining relationships and in light of congressional references to *Denver Building Trades,* possibly to common-situs relationships on particular job sites as well.

Id. at 633. Cited partially at 654 F.2d 1301, 1321 (9th Cir. 1981).

The Ninth Circuit *erroneously* perceived this phrase to mean that a "specific union only" subcontracting clause would be immune from anti-trust restraints if it were to arise in the context of a collective bargaining relationship.

Although it seems clear that the *Connell* Court held that a "specific union only" subcontracting clause outside a collective-bargaining relationship is not entitled to the protection of the construction industry proviso, it does not follow that the converse is true; that is, if such a clause is found in the context of a collective bargaining relationship it would be cloaked

with absolute immunity from the restraints of the antitrust laws. Such a conclusion is callous to this Court's ever constant effort to maintain the delicate balance between the rights of employees, the federal anti-trust policies, and the goals of federal labor policy.

On the other hand, it would seem evident from the *Connell* Court's discussion of the pervasive effects of "single union only" subcontracting clauses on the anti-trust policy of this nation that such clauses are so extraordinarily powerful that to give them the protection of the § 8(e) construction *proviso* would have been to defeat the congressional purpose of limiting top-down organizing campaigns.

THE RELATIONSHIP OF "MOST FAVORED NATIONS" CLAUSES TO "SPECIFIC UNION ONLY" CLAUSES

The Court in *Connell* explored the relationship between "most favored nation" clauses to "specific union only" clauses, concluding that in combination they represented the potential for anti-trust violations. It is also true that the region-wide "specific union only" agreements, such as those contained in the contracts at issue in this case, possess the same devastating direct restraints on trade despite the absence of a "most favored nation" clause.

The only significant benefit to the employer to be achieved by "most favored nation" clauses is that he can be assured that the union will not give a competing contractor or subcontractor an economic advantage. However, in the context of broad "specific union only" subcontracting clause agreements the union is in the driver's seat regarding the terms of any agreement it may sign. Each employer negotiat-

ing with the union must understand with clarity that without such an agreement it is not in a position to bid for work within the construction industry covered by the master labor agreement. Therefore, the general contractor signatories to the master labor agreement need not be concerned that the union, in its desperation to organize other subcontractors or contractors, will be tempted to negotiate more favorable terms. If anything, because of the lopsided advantage that is granted to the union by enforcement of this type of clause, it is in a position to negotiate even higher costs of construction.

Additionally, because the general contractor can only subcontract to firms with *existing* agreements with the union, the union retains the power to determine which firm will be eligible to work upon any given project. And, because of this requirement, the organizing power of the union is not limited to any specific job site as required by § 8(e). Once it is understood that to be eligible to bid or to enter into a subcontracting agreement the prospective subcontractor must already have an effective agreement with the union, then it must be equally clear that the preexistence of this agreement requires that the subcontractor deal with this union on any project regardless of whether it is covered by the master labor agreement.

Because of this aspect of the "specific union only" clauses, the union has not only successfully organized those firms operating within the jurisdiction of the master labor agreement, it has for all practical purposes organized even those firms not working on a covered job site, but who might contemplate doing so at any time in the future, or on future job sites. The union has therefore effectively organized all of the

workers within its jurisdiction, within the geographic region, for an extensive period of time, without ever having spoken to, written to, or even seen one of the affected workers. No employee is allowed to vote or otherwise voice a preference for or against union representation.

When the enormity of the leverage that will be achieved by unions through the use of "specific union only" subcontracting clauses is seen in its true light, there can be no doubt that Congress, in its attempt to restrain the power of organized labor through the enactment of the Labor Management Reporting and Disclosure Act, never intended this preposterous result. Enforcement of these clauses would be the equivalent of destroying all rights of the worker to exercise his § 7 franchise. It would also permit labor unions to combine with their preferred general contractors or general contractor associations for the purpose of eliminating competition and setting costs and prices throughout the construction industry. The grotesque nature of this result is highlighted by the fact that this power would be unique to the construction industry unions.

Rather, it is respectfully submitted that the § 8(e) proviso is intended to carve out a subcontracting exception for the construction industry simply to permit unions to overcome possible organizing problems created by the itinerant nature of the industry, and was never intended to create in construction trade unions the preferential position that would be accorded them if the Ninth Circuit decision is affirmed.

IV. CONCLUSION

The opinion of this Court in *Connell* that "specific union only" subcontracting clauses were not immune from federal anti-trust policies is controlling, regardless of whether the clause is a product of a protected collective bargaining relationship. In light of the need to balance the rights of the individual worker and the federal anti-trust and labor policies, the construction industry proviso to § 8(e) must be interpreted to be a limited exception to the policy against secondary boycotts rather than as a grant of extraordinary power to the construction industry trade unions.

Respectfully submitted,

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